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No. 87-146

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

EDWARD J. ADRIAN and RUTH C. ADRIAN,

Cross-petitioners,

vs.

SMITH BARNEY, HARRIS UPHAM & CO., INC., ALBERT ROBERTS, III and MORTON L. ANNIS, JR.,

Cross-respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI

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46 pp

QUESTIONS PRESENTED

The Court of Appeals below held that Cross-petitioners' claims under the Federal Racketeer Influenced and Corrupt Organizations Act ("RICO") and their claims under § 10(b) of the Securities Exchange Act of 1934 ("§ 10(b) claims") are exempt from compulsory arbitration. That court held the Cross-petitioners' other claims based on Florida law must be arbitrated. Accordingly, the questions presented are:

1. Did the court below err in holding that the RICO and § 10(b) claims are exempt from compulsory arbitration?

2. Did the court below err in holding that the Cross-petitioners' pendent Florida state law claims must be arbitrated?

PARTIES TO THE PROCEEDINGS

1. EDWARD J. ADRIAN, Cross-petitioner/Plaintiff.
2. RUTH C. ADRIAN, Cross-petitioner/Plaintiff.
3. SMITH BARNEY, HARRIS UPHAM & CO., INC., Cross-respondent/Defendant.
4. ALBERT ROBERTS, III, Cross-respondent/Defendant.
5. MORTON L. ANNIS, JR., Cross-respondent/Defendant.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	iv
TABLE OF AUTHORITIES	v
CROSS-PETITION	1
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	10
Appendix A	1a
Appendix B	1b
Appendix C	1c

TABLE OF APPENDICES

		Page
Appendix A	Opinion of the United States Court of Appeals for the Eleventh Circuit in *Adrian v. Smith Barney, Harris Upham & Co., Inc.*, 813 F. 2d 655 (11th Cir. 1987)	1a
Appendix B	Order of the United States District Court for the Middle District of Florida in *Adrian v. Smith Barney, Harris Upham & Co., Inc.*, 84-1652-Civ.T-13 (M.D. Fla. Sept. 17, 1985)	1b
Appendix C	Smith Barney, Harris Upham & Co., Inc. Customer's Agreement	1c

TABLE OF AUTHORITIES

CASES PAGE

Adrian v. Smith Barney, Harris, Upham & Co., Inc., 815 F.2d 665 (11th Cir. 1987) 3, 8

Shearson/American Express, Inc. v. McMahon, 478 U.S. —, 107 S.Ct. 2332, 55 U.S.L.W. 4757 (June 8, 1987) 4, 9

STATUTES

Federal Judiciary and Judicial Procedures Act
28 U.S.C. 1254(1) 2
28 U.S.C. 1331 3
28 U.S.C. 1337 3

Federal Racketeer Influenced and Corrupt Organizations Act
18 U.S.C. § 1961 *et seq.* 2, 3, 8, 9

Federal Securities Exchange Act of 1934
15 U.S.C. § 78cc(b)-[§ 29(b)] 6, 7, 8
15 U.S.C. § 78(j)(b)-[§ 10(b)] 2, 6, 7, 8, 9
§ 27 3

REGULATIONS

Federal Securities and Exchange Commission
17 C.F.R. § 240.15c2-2 ..... 3, 4, 9

RULES

Rules of the Supreme Court of the United States
Rule 17 9
Rule 19.5 2

No. 87-146

In The

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October Term, 1987

EDWARD J. ADRIAN and RUTH C. ADRIAN,

Cross-petitioners,

vs.

SMITH BARNEY, HARRIS UPHAM & CO., INC., ALBERT ROBERTS, III and MORTON L. ANNIS, JR.,

Cross-respondents.

CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Cross-petitioners, EDWARD J. ADRIAN and RUTH C. ADRIAN, respectfully request that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 815 F.2d 655 (11th Cir. 1987). The decision of the United States District Court for the Middle District of Florida is unreported.

———o———

JURISDICTION

The Court of Appeals issued its decision on April 28, 1987. Cross-petitioners recieved a Petition for Writ of Certiorari from SMITH BARNEY, HARRIS UPHAM & CO., INC. and ALBERT ROBERTS, III on July 27, 1987. Cross-petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1) and Rule 19.5, Rules of the Supreme Court of the United States.

———o———

STATUTORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are set forth verbatim in the body of this Cross-petition.

———o———

STATEMENT OF THE CASE

Plaintiffs/Cross-petitioners, EDWARD J. ADRIAN and RUTH C. ADRIAN, brought this action asserting claims under § 10(b) of the Securities Exchange Act of 1934, under the Federal Racketeer Influenced and Corrupt

Organizations Act and under state statutory and common law for misconduct in connection with securities accounts maintained by them with Defendant/Cross-respondent SMITH BARNEY, HARRIS UPHAM & CO., INC. ("SMITH BARNEY"). Defendant/Cross-respondent MORTON L. ANNIS, JR. was the ADRIANS' account executive and defendant/Cross-respondent ALBERT ROBERTS, III was manager of the Tampa, Florida branch office where the accounts were maintained. Jurisdiction in the district court was invoked pursuant to § 27 of the Securities Exchange Act of 1934 and pursuant to 28 U.S.C. §§ 1331 and 1337.

Although the ADRIANS' argued that the SMITH BARNEY Customer's Agreement which contained an arbitration clause was void pursuant to 17 C.F.R. § 240.15c2-2, the district court ordered arbitration of all of the ADRIANS' claims, including the § 10(b) and RICO claims. On appeal, the circuit court affirmed the order compelling arbitration of the ADRIANS' state law claims. However, the circuit court reversed the order compelling arbitration of the § 10(b) and RICO claims based on Eleventh Circuit precedent holding that such claims were exempt from the provisions of the Federal Arbitration Act. *Adrian v. Smith Barney, Harris Upham & Co., Inc.*, 815 F.2d 665 (11th Cir. 1987).

———o———

REASONS FOR GRANTING THE WRIT

Since there is no valid, enforceable arbitration agreement between the parties, by virtue of 17 C.F.R. § 240.15c2-2 and the terms of the customer's agreement itself, the Eleventh Circuit Court erred in compelling arbitration of any of the Adrians' claims.

Cross-respondents' reliance in their Petition for a Writ of Certiorari on this Court's decision in *Shearson/American Express, Inc. v. McMahon*, 478 U.S. —, 107 S.Ct. 2332, 55 U.S.L.W. 4757 (June 8, 1987), is misplaced because that case presupposed the existence of a valid, enforceable arbitration contract between the parties. The instant case can be easily distinguished from *McMahon* due to the law which applied to their brokerage accounts. The *McMahon* case arose out of the alleged churning of McMahon's brokerage account from 1980 to 1982, whereas the ADRIANS' allege that their accounts were churned from 1981 until 1984. Effective December 28, 1983, the Securities and Exchange Commission, pursuant to its congressionally delegated policy-making and regulatory authority, promulgated the following regulation which can be found at 17 C.F.R. § 240.15c2-2.

> § 240.15c2-2 Disclosure regarding recourse to the courts notwithstanding arbitration clauses in broker-dealer customer agreements.
>
> (a) *It shall be a fraudulent, manipulative or deceptive act or practice for a broker or dealer to enter into an agreement with any public customer which purports to bind the customer to the arbitration of future disputes between them arising under the Federal securities laws, or to have in effect such an agreement,* pursuant to which it effects transactions with or for a customer.

(b) Notwithstanding paragraph (a) of this section, until December 31, 1984, a broker or dealer may use existing supplies of customer agreement forms if all such agreements entered into with public customers after December 28, 1983 are accompanied by separate written disclosure.

Although you have signed a customer agreement form with FIRM NAME that states that you are required to arbitrate any future dispute or controversy that may arise between us, you are not required to arbitrate any dispute or controversy that arises under the federal securities law but instead can resolve any such dispute or controversy through litigation in the courts.

(c) A broker or dealer shall not be in violation of paragraph (a) of this section with respect to any agreement entered into with a public customer prior to December 28, 1983 if:

(1) Any such public customer for whom the broker or dealer has after July 1, 1983, (i) carried a free credit balance, or (ii) held securities for safekeeping or as collateral, or (iii) effected a securities transaction is sent, no later than December 31, 1984, the disclosure prescribed in paragraph (b) of this section; or,

(2) Any other public customer is sent upon the completion of his next transaction pursuant to such agreement, the disclosure prescribed in paragraph (b) of this section. (emphasis supplied).

The Record in the court below in this cause does not reflect when the subject "Customer's Agreement" was signed or that Cross-respondents can rely on any of the exceptions found in subparagraphs (b) or (c) of this regulation. Therefore it was and is a fraudulent, manipulative and deceptive act or practice for a securities broker or dealer to enter into, or *have in effect*, an agreement with its customers to arbitrate future disputes. Accordingly, for Cross-

respondents to enter into or have in effect the subject arbitration agreement constitutes a violation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(j)(b). That section of the Securities Exchange Act of 1934 declares unlawful the use of a deceptive or manipulative device and provides as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> *
> *
> *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Since the subject arbitration agreement is unlawful and a violation of the Securities Exchange Act of 1934, the alleged agreement is also "void" under the provisions of § 29(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(b). That statute provides, in pertinent part, as follows:

> (b) *Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract* (including any contract for listing a security on an exchange) *heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation thereunder, shall be void* (1) as regards the rights of any person who, in violation of

> any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation. (emphasis supplied)

Thus, the subject arbitration clause, being a manipulative and deceptive device under the above cited federal regulation and, consequently, a violation of § 10(b) of the 1934 Act, is clearly invalid and void under § 29(b). The entering into of the subject contract and the *performance* of the arbitration agreement violates § 10(b). The agreement is therefore void.

The above-referenced federal statutes and the regulation of the Securities and Exchange Commission not only rendered the alleged agreement to arbitrate invalid and unenforceable as set forth above, but also triggered an automatic revision to delete the arbitration clause under the express terms of the "Customer's Agreement" itself. The "agreement" provides at paragraph 2, as follows:

> Whenever any statute shall be enacted which shall affect in any manner or be inconsistent with any of the provisions hereof, or *wherever any rule or regulation shall be prescribed or promulgated by* the New York Stock Exchange, Inc., *the Federal Securities and the Exchange Commission*, the Board of Governors of the Federal Reserve System and/or the Secretary of Agriculture *which shall affect in any manner or be inconsistent with any of the provision hereof, the provisions of this agreement so affected shall be deemed modified or superseded*, as the case may be by such statute, rule or regulation, and all other provisions of the agreement and the provisions as so modified or

> superseded, shall in all respects continue and be in full force and effect. (emphasis supplied)

The provisions of §§ 10(b) and 29(b), 15 U.S.C. §§ 78(j)(b) and 78cc(b), and the regulation promulgated by the Securities and Exchange Commission discussed above are clearly inconsistent with the Customer's Agreement. The Customer's Agreement purports to require (and the Respondents/Cross-petitioners assert it requires), arbitration of all disputes. However, under express terms of paragraph 2 of the Customer's Agreement, to the extent that it requires arbitration, the Agreement has been modified and superseded. By the very terms of the Customer's Agreement, there is no arbitration agreement for the lower court to enforce.

The ADRIANS' timely raised 17 C.F.R. § 240.15c2-2 on pages 11 and 12 of Plaintiffs' Memorandum of Law in Opposition to Consolidated Motion to Compel Arbitration of Defendant, Morton L. Annis, Jr. and in Opposition to Consolidated Motion to Dismiss or Compel Arbitration of Defendants, Smith Barney, Harris Upham & Co., Inc. and Albert Roberts, III, dated July 15, 1985, in the district court, and again on pages 13 through 17 of their Brief of Appellants and on pages 2 through 4 of their Reply Brief of Appellants filed in the circuit court.

Even though the above arguments were raised by the ADRIANS' both in the trial court and the circuit court, the circuit court in its opinion did not decide these arguments apparently since it found that its own precedents required reversing the trial court's order compelling arbitration of the § 10(b) and RICO claims. *Adrian v. Smith Barney, Harris Upham & Co., Inc.*, 815 F.2d 665 (11th Cir. 1987).

Similarly, the District Court did not make mention of this question in its Order of September 17, 1985.

This Court determined in *McMahon* that § 10(b) and RICO claims are arbitrable under Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, that the Act only allows the courts to compel arbitration where there is "... an agreement in writing for such arbitration. ..." 9 U.S.C. § 3. As has been shown above, there is no agreement requiring arbitration that can be enforced. Accordingly, the effect of the ruling of the circuit court on the § 10(b) and Federal RICO claims, albeit for the wrong reasons, is nevertheless correct and should be affirmed, and the ruling on the pendent state law claims should be reversed.

This Court should exercise its discretionary certiorari jurisdiction in this case for several reasons within the purview of Rule 17, Rules of the Supreme Court of the United States. First, an important question of Federal law, the effect of 17 C.F.R. § 240.15c2-2, although timely raised, has been overlooked or ignored by the courts below. Second, the decision of the circuit court on this case conflicts with this Court's decision in *McMahon, supra.*

———o———

CONCLUSION

This Court should accept the Cross-petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

April 28, 1987

RICHARD D. DRISCOLL,

Plaintiffs-Appellants,

vs.

SMITH BARNEY, HARRIS, UPHAM & CO., INC.,
RICHARD SHALLA,

Defendants-Appellees.

EDWARD J. ADRIAN, RUTH C. ADRIAN,

Plaintiffs-Appellants,

vs.

SMITH BARNEY, HARRIS, UPHAM & CO., INC.,
A Delaware Corporation,
MORTON L. ANNIS, JR., ALBERT ROBERTS, III,

Defendants-Appellees.

Nos. 85-5921, 85-3816 and 86-3009.

Brokerage customers brought actions arising out of alleged mismanagement of securities accounts by firm and its employees. After the United States District Court for the Southern District of Florida, No. 84-8223 CIV-EBD, Edward B. Davis, J., 625 F.Supp. 25, and the United States District Court for the Middle District of Florida, No. 84-

1652-CIV-T-13, George C. Carr, J., had granted firm's motions to compel arbitration on all claims, customers appealed. The Court of Appeals, Vance, Circuit Judge, held that: (1) claims under the federal Racketeer Influenced and Corrupt Organization Act based on violations of federal securities laws were not subject to compelled arbitration; (2) claims under Florida Racketeer Influenced and Corrupt Organization Act were subject to compelled arbitration; and (3) brokerage customers seeking to evade compelled arbitration of state law claims pursuant to arbitration agreements had failed to adequately allege invalidity of arbitration agreements.

Affirmed in part; reversed in part; and remanded with directions.

1. Exchanges 11(11)

Federal securities law claims under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 were not subject to compulsory arbitration based upon preclaim brokerage agreements. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

2. Commerce 82.71

Claim under the federal Racketeer Influenced and Corrupt Organization Act must be based on underlying, independently unlawful acts. 18 U.S.C.A. §§ 1961, 1962.

3. Exchanges 11(11)

Claims under the federal Racketeer Influenced and Corrupt Organization Act based on violations of federal securities laws were not subject to compelled arbitration. 18 U.S.C.A. §§ 1961-1968.

4. Constitutional Law 70.1(7)

Court of Appeals cannot create exception to federal Arbitration Act absent some indication, whether express or implied, of congressional intent for such an exception. 9 U.S.C.A. §§ 1-14.

5. Exchanges 11(11)

Securities Act of 1933 and Securities Exchange Act of 1934 provide congressional intent to exclude claims under particular provisions of acts from mandate of federal Arbitration Act. 9 U.S.C.A. §§ 1-14; Securities Exchange Act of 1933, § 12(2), 15 U.S.C.A. § 771(2); Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

6. Arbirtation 3.3.

Congressional intent that federal Racketeer Influenced and Corrupt Organization Act claims not be subjected to compelled arbitration is found by implication from unique structure of RICO statute which cross-refernces other predicate statutes. 9 U.S.C.A. §§ 1-14; 18 U.S.C.A. §§ 1961-1968.

7. Arbitration 3.3

Claims under Florida Racketeer Influenced and Corrupt Organization Act were subject to compelled arbitration, even though predicate acts for Florida RICO claim were federal securities law violations that were not subject to compelled arbitration, given the federal Arbitration Act. 9 U.S.C.A. §§ 1-14; West's F.S.A. § 895.011 *et seq.*

8. Exchanges 11(11)

Brokerage customers seeking to evade compelled arbitration pursuant to customer agreements on ground arbi-

tration agreements were unconscionable adhesion contracts had produced no evidence indicating agreements were adhesion contracts, demonstrating neither lack of meaningful choice nor that arbitration clauses were inherently unfair or oppressive.

9. Exchanges 11(11)

Brokerage customers seeking to evade compelled arbitration pursuant to customer agreements on ground agreements lacked mutuality of obligation had failed to show lack of mutuality of obligation, where in return for customers' assent to customer agreements, brokerage firm obligated itself to perform all necessary services in connection with maintenance of customers' accounts and to submit any controversy relating to accounts to arbitration.

10. Exchanges 11(11)

Absence of signature by brokerage firm's repesentative on customer agreement including arbitration provision did not prove lack of mutuality of obligation sufficient to permit customers to evade compelled arbitration.

11. Exchanges 11(11)

Allegations of brokerage customers seeking to evade compelled arbitration pursuant to arbitration agreements on theory that arbitration agreements were fraudulently induced, that when customer agreements were signed, brokerage firm's agent indicated that consent to customer agreement was mere formality and did not inform customers about arbitration provision, went to formation of entire contract rather than to misrepresentation with respect to arbitration clause, and were thus allegations which should be heard by arbitrator rather than by district court.

12. Exchange 11(11)

Brokerage customers seeking to evade compelled arbitration of state law claims pursuant to customer agreements had failed to allege fraud in the "factum" through allegations that when customer agreements providing for arbitration were signed, brokerage firm's agent indicated consent to customer agreements was mere formality and did not inform customers about arbitration provision; claimed misrepresentation did not go to very character or essential terms of proposed contract.

13. Exchanges 11(11)

Brokerage firm had not waived its right to arbitration by failing to request arbitration within 30-day period called for by district court's order; brokerage firm's actions reflected persistent and zealous effort to secure arbitration of customer's claims, and any delay in request for arbitration was understandable, given that customers had immediately appealed order permitting arbitration.

14. Federal Civil Procedure 825

Plaintiffs' right to amend their complaint once as matter of course remained unimpeded, where defendants' only filing prior to motion to amend was motion to dismiss and to compel arbitration. Fed.Rules Civ.Proc. Rule 15(a), 28 U.S.C.A.

Russell L. Forkey, Layne Verebay, Ft. Lauderdale, Fla., for plaintiff-appellant in No. 85-5921.

Robert B. Goldman, Ruden, Barnett, McClosky, Schuster & Russell, P.A., Bennett Falk, Keith Olin, Miami, Fla., for defendants-appellees in No. 85-5921.

Kirk M. Gibbons, John B. Gibbons, Tampa, Fla., for plaintiff-appellants in Nos. 85-3816 and 86-3009.

Kathy M. Klock, Miami, Fla. for Annis.

O'Bannon M. Cook, Ruden, Barnett, McClosky, Schuster & Russell, P.A., Bennett Falk, Robert B. Goldman, Tallahassee, Fla., Keith Olin, Miami, Fla., for Smith Barney, Inc. and Roberts.

Appeal from the United States District Court for the Southern District of Florida.

Appeal from the United States District Court for the Middle District of Florida.

Before VANCE and ANDERSON, Circuit Judges, and ARONOVITZ,* District Judge.

VANCE, Circuit Judge:

These separate suits arise out of the alleged mismanagement of securities accounts by Smith Barney, Harris, Upham & Co. (Smith Barney) and its employees. (Richard Driscoll asserts claims against Smith Barney and Richard Shalla for violations of Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 (the 1934 Act) and for breach of fiduciary duty under Florida law. Edward and Ruth Adrian also allege violations of Section 10(b) and Rule 10b-5 of the 1934 Act and breach of fiduciary duty, along with claims under the federal Racketeer Influenced and Corrupt Organization Act (18 U.S.C. §§ 1961-68), the Florida Racketeer Influenced and Corrupt Organization Act (Fla.Stat. Chap. 895), the Florida Securities and Investor Protection Act (Fla.Stat. Chap. 517), and state law negligence, gross negligence, fraud, conversion, and breach of contract. Upon setting up their accounts, the Adrians

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* Honorable Sidney M. Aronovitz, U.S. District Judge for the Southern District of Florida, sitting by designation.

and Driscoll signed agreements which included clauses providing that disputes relating to these accounts would be subject to arbitration. Pursuant to these brokerage agreements, the district courts in these two cases granted Smith Barney's motions to compel arbitration on all claims. 625 F.Supp. 25 (S.D.Fla. 1985). Plaintiffs now contend that the district courts erred in compelling arbitration.[1]

A. Federal Securities Law Claims

[1] The first issue before this court is whether claims brought under Section 10(b) of the 1934 Act are subject to arbitration. This precise issue was recently taken up by this court sitting en banc. *Wolfe v. E. F. Hutton & Co.*, 800 F.2d 1032 (11th Cir. 1986). In *Wolfe*, this court held that preclaim agreements to arbitrate 10b-5 claims are not enforceable. In light of this recent decision, we reverse the portion of the district courts' orders compelling arbitration of plaintiffs' federal securities law claims.[2]

B. Federal RICO Claims

[2, 3] The Adrians allege violations of the federal RICO statute. Unlike the typical state or federal claim, a RICO claim must be based upon underlying, independently unlawful acts. *See* 18 U.S.C. §§ 1961-62; *Greenblatt v.*

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[1] This court has jurisdiction under 28 U.S.C. 1292(a)(1) to review a district court order compelling arbitration. See *Miller v. Drexel Burnham Lambert, Inc.*, 791 F.2d 850, 853 (11th Cir. 1986).

[2] We note, however, that the Supreme Court has granted review to resolve a split among the circuit courts on this very issue. *Shearson/American Express, Inc. v. McMahon*, U.S., 107 S.Ct. 60, 93 L.Ed.2d 20 (1986).

Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1361 (11th Cir. 1985). This unique feature of RICO presents special problems in determining whether RICO claims are subject to arbitration under a preclaim agreement. In *Tashea v. Bache, Halsey, Stuart, Shields, Inc.*, 802 F.2d 1337 (11th Cir. 1986), this court held that federal RICO claims based on violations of the federal securities laws are not subject to compelled arbitration. Since the underlying acts in the Adrians' federal RICO claim are federal securities law violations, *Tashea* mandates that the district court decide this claim.

C. State Law Claims

In concluding that federal RICO claims based on federal securities law violations are not arbitrable, the *Tashea* court relied on the fact that in this circuit, according to *Wolfe v. E. F. Hutton & Co.*, 800 F.2d 1032 (11th Cir. 1986) (en banc), the underlying predicate acts were not arbitrable. The *Tashea* court reasoned:

> Consistency in the orderly adjudication of these claims would seem to require the RICO claim to be decided in the same forum as the separate federal securities claims.

802 F.2d at 1338.

Along with enumerating a number of state law crimes as constituting "racketeering activity," the Florida statute incorporates "[a]ny conduct defined as 'racketeering activity' under 18 U.S.C. 1961(1)(A), (B), (C) and (D)." Fla. Stat. § 895.02(1)(b). This statutory scheme permits the predicate acts for the Florida RICO claim to be federal securities law violations which are not arbitrable.

[4] In the interest of consistency, *Tashea* would seem to require that the Florida RICO claim be decided in the same forum—the federal courts—as the seperate federal securities claims on which it is based. This conclusion, however, would be contrary to a fundamental precept of statutory interpretation. This court cannot create an exception to the Federal Arbitration Act, 9 U.S.C. §§ 1-14, absent some indication, whether express or implied, of congressional intent for such an exception. As the Third Circuit recently commented in light of the Supreme Court's opinion in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985), which held that antitrust claims against foreign corporations are arbitrable: "It would appear therefore that determining statutory claims to be nonarbitrable on the basis of some judically recognized public policy rather than as a matter of statutory interpretation is no longer permissible." *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197, 1202 (3rd Cir. 1986).

[5-7] The Securities Act of 1933 and the Securities Exchange Act of 1934 provide the congressional intent to exclude claims under Sections 12(2) and 10(b) of those respective acts from the mandate of the Federal Arbitration Act. *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953); *Wolfe v. E. F. Hutton & Co.*, 800 F.2d at 1032. The congressional intent that federal RICO claims not be subjected to arbitration is found by more subtle implication: "the unique structure of the RICO statute which cross-references other predicate statutes," *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d at 1202. We have no indication by way of statutory enactment that Congress intended to likewise exclude state RICO

claims. Indeed Congress could not have remotely foreseen the enactment by states of statutes patterned after its own. Nor can it be said that excluding state RICO claims from the mandate of the Federal Arbitration Act is necessary to effectuate some congressional purpose. We must therefore hold that the Adrians' Florida RICO claims are subject to arbitration.

Controlling authority requires that plaintiffs' other state law claims be arbitrated. In *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985), the Supreme Court concluded that arbitration agreements are enforceable with respect to state law claims, even if the accompanying federal securities law claims proceed to trial. The Court's language in *Byrd* is unequivocal.

> [T]he Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums.

105 S.Ct. at 1241. *See also Coleman v. Prudential Bache Securities, Inc.*, 802 F.2d 1350 (11th Cir. 1986); *Wolfe v. E. F. Hutton & Co.*, 800 F.2d 1032 (11th Cir. 1986) (en banc).

[8-10] In an attempt to evade *Byrd*, plaintiffs raise a number of challenges to the arbitration agreements employed by Smith Barney. Plaintiffs charge that these agreements to arbitrate are not valid contracts because they were fraudulently induced, were unconscionable adhesion contracts, and lacked mutuality of obligation. Plaintiffs are correct that a court may not order arbitration unless and 'until it is satisfied that a valid arbitration agree-

ment exists.' *Miller v. Drexel Burnham Lambert, Inc.*, 791 F.2d 850, 854 (11th Cir. 1986). Their attacks on these arbitration agreements, however, do not survive close scrutiny. Plaintiffs produce no evidence to indicate that the arbitration agreements are adhesion contracts. They demonstrate neither a lack of "meaningful choice," *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C.Cir. 1965), nor that the arbitration clauses are inherently unfair or oppressive. *See Coleman v. Prudential Bache Securities, Inc.*, 802 F.2d at 1352; *Surman v. Merrill Lynch, Pierce, Fenner & Smith*, 733 F.2d 59, 61 n.2 (8th Cir. 1984). Similarly, plaintiffs fail to show a lack of mutuality of obligation. In return for plaintiffs' assent to the Customer Agreement, Smith Barney obligated itself to perform all the necessary services in connection with the maintenance of plaintiffs' accounts and, in particular, to submit any controversy relating to these accounts to arbitration.[3]

[11, 12] Plaintiffs' chief argument is that the arbitration agreements were fraudulently induced. Driscoll and the Adrians independently submitted affidavits to buttress this contention. The sum of their affidavits is the same: when each signed the Customer Agreement, Smith Barney's agent indicated that the investor's consent to the Customer Agreement was a mere formality required to transact business with Smith Barney and never informed the investor about the arbitration provision. The allegations contained

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[3] The Adrians also are incorrect in arguing that the absence of the Smith Barney representative's signature on the Customer Agreement proves a lack of mutuality of obligation. *Cf. Associated Hardware Supply Co. v. Big Wheel Distributing Co.*, 355 F.2d 114 (3d Cir. 1965); *Starkman v. Seroussi*, 377 F.Supp. 518 (S.D.N.Y. 1974).

in the affidavits, however, go to the formation of the entire contract rather than to any misrepresentation with respect to the aribtration clause. Under *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), where the claims of confusion and fraud go to the circumstances surrounding the signing of the contract as a whole, these allegations should be heard by an arbitrator and not by the district court. *See also Coleman v. Prudential Bache Securities. Inc.*, 802 F.2d at 1352; *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Haydu*, 637 F.2d 391 (5th Cir. Unit B 1981).[4]

Despite their best efforts, plaintiffs have failed to adequately allege the invalidity of the arbitration agreements. We therefore affirm the district courts' orders compelling arbitration of plaintiffs' breach of fiduciary duty and other state law claims.

D. Waiver

[13] The Adrians' further contend that Smith Barney waived its right to arbitrate his claims by failing to request arbitration within the thirty day period called for by the district court's order. This argument is without merit. Smith Barney's actions reflect a persistent and zealous effort to secure arbitration of the Adrians' claims. Any delay in Smith Barney's request for arbitration was entirely understandable since the Adrians' had immediately

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[4] Appellants also fail to allege fraud in the "factum" since the claimed misrepresentation by defendants does not go to the very character or essential terms of the proposed contract. *See Cancanon v. Smith Barney, Harris, Upham & Co.*, 805 F.2d 998 (11th Cir. 1986).

appealed the order permitting arbitration. Given that any doubts about a waiver of arbitration must be resolved in favor of arbitration. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 941-942, 74 L.Ed.2d 765 (1983), the Adrians' clearly have not met their "heavy burden" of proving waiver. See *Belke v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 693 F.2d 1023, 1025 (11th Cir. 1982).

E. Motion to Amend

[14] The district court also denied the Adrians' motion to amend their complaint. Federal Rule of Civil Procedure 15(a) provides that "[a] party may amend his pleadings once as a matter of course at any time before a responsive pleading is served . . ." Defendants' only filing prior to the motion to amend was their motion to dismiss and to compel arbitration. Such a motion to dismiss is not a "responsive pleading." *See, e.g. McGruder v. Phelps*, 608 F.2d 1023, 1025 (5th Cir. 1979); *Barksdale v. King*, 699 F.2d 744, 747 (5th Cir. 1983). Therefore, the Adrians' right to amend their complaint as a matter of course remained unimpeded.[5]

F. Conclusion

The district court's judgment in No. 85-5921 is AFFIRMED as to the state claim and REVERSED as to the federal claims. The case is REMANDED with directions that the district court deny defendants' motion to

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[5] The decision to deny the motion to amend was also premised on the incorrect belief that all of the plaintiffs' claims were arbitrable.

arbitrate the federal securities law claims. The district court judgment in No. 85-3816 and No. 86-3009 is also AFFIRMED as to the state claims and REVERSED as to the federal claims. Those cases are REMANDED with directions that the district court deny defendants' motion to arbitrate the federal securities law claims and the federal RICO claims, and that the district court grant plaintiffs' motion to amend their complaint.

AFFIRMED in part. REVERSED in part and REMANDED with directions.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

Case No. 84-1652-Civ-T-13

EDWARD J. ADRIAN AND
RUTH C. ADRIAN, HIS WIFE,

Plaintiffs,

vs.

SMITH BARNEY, HARRIS UPHAM &
CO., INC., MORTON L. ANNIS,
JR. AND ALBERT ROBERTS, III,

Defendants.

ORDER

This cause comes before the Court upon the defendant Morton L. Annis, Jr.'s consolidated motion to compel arbitration and the consolidated motion to dismiss or compel arbitration filed by the defendants Smith Barney, Harris Upham & Co., Inc. and Albert Roberts, III. In addition to their response to the above motions, the plaintiffs have filed a motion to amend their complaint and a motion to strike a reply to their response. The defendants oppose the motion to amend the complaint.

The plaintiffs' motion to strike the reply is GRANTED since the reply was filed in violation of Local Rule 3.01(b), Middle District of Florida. The reply will not be considered in the determination of the issues before the Court.

The original complaint contains ten counts, including: count I, brought under the Securities Exchange Act of 1934; count II, under the Florida Investors Protection Act; count

III, alleging negligence; count IV, gross negligence; count V, breach of contract; count VI, fraud; count VII, conversion; count VIII, breach of fiduciary relationship; count IX, Federal RICO; and count X, alleging a violation of Florida's RICO statute. The plaintiffs motion to amend the complaint seeks to include an additional count alleging violation of the Securities Act of 1933.

The motion to dismiss is DENIED as to all counts in the original complaint. It is well established that "a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would not be entitled to recover under any state of facts that could be proved in support of his claim." *Cook & Nichol, Inc. v. The Plimsoll Club,* 451 F.2d 505, 506 (5th Cir. 1971). *Accord, Conley v. Gibson,* 355 U.S. 41 (1957); *see also Sedima, S.P.R.L. v. Imrex Company, Inc.,* 53 U.S.L.W. 5034, 5038 (U.S. July 1, 1985) (no need for prior conviction before bringing civil action under RICO).

In view of the Supreme Court's liberal reading of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.,* in *Dean Witter Reynolds, Inc. v. Byrd,* 105 S.Ct. 1238 (1985), compelling arbitration of pendent state law claims, counts II through VII and count X of the original complaint shall be arbitrated as provided in paragraph 16 of the "customer's agreement" signed by the plaintiffs. That agreement provided:

> Subject to the last three sentences of this paragraph, any controversy arising out of or relating to the account of the undersigned shall be settled by arbitration in accordance with the rules, then in effect, of the Board of Directors of the American Stock Exchange, Inc., the Board of Directors of the New York

> Stock Exchange, Inc., or the National Association of Securities Dealers, Inc., as the undersigned may elect . . . . Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof. The parties, hereto, and all who claim under their rights shall be bound conclusively by such arbitration. The federal securities law provide that agreements may not bind persons to waive compliance with any provision of the federal securities laws. Therefore, nothing in this paragraph shall in any way constitute a waiver or limitation of any rights which the undersigned may have under any federal securities laws. The provisions of this paragraph do not apply to commodity accounts, which are governed by the provisions of the commodity customer's agreement.

Paragraph 16 of "customer's agreement", Smith Barney's consolidated motion (Exhibit "A").

The remaining issues are whether count IX, alleging a violation of the federal RICO statute, and count I brought under the Securities Exchange Act of 1934, should be submitted to arbitration, and whether the plaintiffs should be allowed to amend their complaint to include count XI, which alleges a violation of the Securities Act of 1933. There has been no authoritative ruling from the Supreme Court as to the propriety of compelling arbitration of a civil claim brought under the federal RICO act. In fact, the issue of "whether a RICO claim is a nonarbitrable federal claim is an open question in [the Eleventh] circuit." *Greenblatt v. Drexel Burnham Lambert, Inc.*, No. 84-8522, slip. op. at 4712 (11th Cir. June 25, 1985). However, considering the Supreme Court's opinion in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983), suggesting that "any doubts concerning the

scope of arbitrable issues should be resolved in favor of arbitration", and the recent Eleventh Circuit decision in *Greenblatt,* slip op. at 4712, stating that "a RICO claim is unusual in that it must be based on underlying, independently unlawful acts" that are often, as in the case at bar, contractual and state law claims, arbitration of the federal RICO claims is appropriate. *See Id.* (determination of predicate acts underlying Federal RICO claims is "directly within the scope of the contractual arbitration clause and the arbitrator's expertise"). The motions to compel the federal RICO claims are GRANTED. *See e.g. Finn v. Davis,* No. 84-8414-Civ-Gonzalez, Order at 7-8 (S.D. Fla. June 20, 1985) (compelling arbitration of RICO claim).

The claims under the federal securities laws in Count I of the original complaint and count XI of the proposed amended complaint present more difficult questions. The language of the customer's agreement, above, as well as rulings from the Supreme Court and the Eleventh Circuit express concern for the preservation of rights arising under the federal securities laws. The decision of *Wilko v. Swan,* 346 U.S. 427 (1953), "held that a predispute agreement to arbitrate claims that arise under § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77 1 (2), was not enforceable." *Byrd,* 105 S.Ct. at 1240 n.1. The *Wilko v. Swan* decision was extended by the Fifth Circuit, and later the Eleventh, to apply in the context of claims arising under the securities Exchange Act of 1934, 15 U.S.C. § 78j(b), thereby holding that agreements to arbitrate such claims are unenforceable. 105 S.Ct. at 1240 n.1 (citing *Sibley v. Tandy Corp.,* 543 F.2d 540, 543 and n.3 (5th Cir. 1976), *cert. denied,* 434 U.S. 824 (1977); *Belke v. Merrill Lynch, Pierce, Fenner & Smith Inc.,* 693 F.2d 1023 (11th Cir. 1982).

The Fifth and Eleventh Circuit Court of Appeals decisions that precluded arbitration of claims brought under the Securities Exchange Act of 1934, have recently been drawn into question. Both the *Sibley* and the *Belke* decisions, *supra,* were based upon the "intertwining" doctrine. "Under the intertwining approach, 'when it is impractical if not impossible to separate out non-arbitrable federal securities laws claims from arbitrable contract claims, a court should deny arbitration in order to preserve its exclusive jurisdiction over the federal securities act claims.' " *Dimestein v. Whiteman,* Nos. 84-8369 to 84-8371, slip op. at 3552 (11th Cir. May 8, 1985) (quoting *Sibley, supra*). The *Byrd* decision specifically rejected the intertwining approach. 105 S.Ct. at 1241. In response, the Eleventh Circuit announced that the *Byrd* decision had caused "us to shift our focus." *Dimestein,* slip op. at 3552-54 (outlining Supreme Court's rejection of intertwining approach and expressing agreement with portion of justice White's concurrence in Byrd which suggested that arbitrable and non-arbitrable claims go forward independently without stay in proceedings). Both *Byrd* and *Dimestein,* together with the national policy favoring arbitration, *see Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1 (1983), and the lead of other district courts within this circuit, convinces this Court that arbitration of a claim under the Securities Exchange Act of 1934, may be compelled if within the terms of an enforceable arbitration agreement. *See e.g., Niven v. Dean Witter Reynolds, Inc.* No. 84-1594-Civ-T-10 (M.D.Fla. March 28, 1985); *Finn v. Davis,* No. 84-8414-Civ-Gonzalez (S.D.Fla. June 20, 1985); *Driscoll v. Smith Barney, Harris Upham & Co., Inc.,* No. 84-8223-Civ-Davis (June 6, 1985); *Greenstein v. First Biscayne Corporation,* No. 82-0584-Civ-Hastings (S.D.Fla.

May 16, 1985); see also 105 S.Ct. at 1244-45 (White, J., concurring).

The customer's agreement in the case at bar expressly provided that "nothing in this paragraph shall in any way constitute a waiver or limitation of any rights which the undersigned may have under any federal securities laws." *See supra.* Since this Court has found that claims brought under the Securities Exchange Act of 1934 may be arbitrable, the above language does not prevent arbitration. In any event, the plaintiff's rights under the securities laws will be adequately protected since "arbitration proceedings will not necessarily have a preclusive effect on subsequent federal-court proceedings." *Byrd,* 105 S.Ct. at 1243. If the plaintiffs wish to raise their claims under the 1934 Act after arbitration, the Court, at that time, may "directly and effectively protect federal interests by determining the preclusive effect to be given to [the] arbitration proceeding." *Id.* The motions to compel arbitration of count I of the original complaint are GRANTED.

Only the motion to amend the complaint remains to be decided. Before the plaintiffs sought to amend their complaint the issue of arbitrability had been hotly debated and thoroughly briefed by the parties. In order to resolve the issues raised in those briefs in light of recent decisions, this Court Ordered consolidated motions and responses. The motion to amend the complaint to include a nonarbitrable claim was filed the very next day, approximately seven months after the original complaint and over two months after an amended motion to compel arbitration of all claims in the original complaint had been filed. As stated by a federal district court in *Greenstein v. First Biscayne Corporation,* No. 82-0584-Civ-Hastings (S.D.Fla. May 16, 1985):

> Plaintiff[s], realizing the possible effect of the *Byrd* decision on the arbitrability of [their] cause of action, have moved for leave to amend [their] complaint to include a non-arbitrable § 12(2) claim [under the federal Securities Act of 1933]. Allowing amendment at this late stage of the proceedings is within the sound discretion of the Court. *Chitmacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1163 (5th Cir. 1982). The Court should consider, among other factors, whether amendment would cause delay in the proceedings, whether amendment would lead to expeditious disposition of the merits of the litigation and judicial economy. *Id.*
>
> As all the other claims have been compelled to arbitration, amendment would result in undue delay and would be counter-productive to expeditious resolution of the action.
>
> The motion to amend the complaint is DENIED.

The defendants are Ordered to answer the original complaint within ten (10) days as provided in Rule 12(a), Federal Rules of Civil Procedure. After both defendants have answered, this action is stayed for thirty (30) days within which any party may apply for arbitration, if such application is made and the arbitration proceedings go forward, the stay will remain in effect until the arbitrators' final decision is properly filed with the Court or until further Order of the Court. The defendants are directed to file with the Court at the end of sixty (60) days a report concerning the status of the arbitration proceedings.

DONE AND ORDERED in Chambers at Tampa, Florida, this 17th day of September, 1985.

/s/ George C. Carr
UNITED STATES
DISTRICT JUDGE

APPENDIX C

Legal 2

SMITH BARNEY, HARRIS UPHAM & CO.
INCORPORATED

CUSTOMER'S AGREEMENT

Oft.No.	Account Number
075	000620

Edward J. & Ruth C. Adrian

Name

Smith Barney, Harris Upham & Co.
INCORPORATED
120 Broadway
New York, New York 10005

Gentlemen:

In consideration of your accepting one or more accounts of the undersigned (whether designated by name, number or otherwise) and your agreeing to act as brokers for the undersigned in the purchase or sale of securities or commodities, the undersigned agrees as follows:

1. All transactions under this agreement shall be subject to the constitution, rules, regulations, customs and usages of the exchange or market, and its clearing house, if any, where the transactions are executed by you or your agents, and, where applicable, to the provisions of the Securities Exchange Act of 1934, the Commodities Ex-

change Act, and present and future acts amendatory thereof and supplemental thereto, and the rules and regulations of the Federal Securities and Exchange Commission, the Board of Governors of the Federal Reserve Systems and of the Secretary of Agriculture in so far as they may be applicable.

2. Whenever any statute shall be enacted which shall affect in any manner or be inconsistent with any of the provisions hereof, or whenever any rule or regulation shall be prescribed or promulgated by the New York Stock Exchange, Inc., the Federal Securities and Exchange Commission, the Board of Governors of the Federal Reserve System and/or the Secretary of Agriculture which shall affect in any manner or be inconsistent with any of the provisions hereof, the provisions of this agreement so affected shall be deemed modified or superseded, as the case may be by such statute, rule or regulation, and all other provisions of this agreement and the provisions as so modified or superseded, shall in all respects continue and be in full force and effect.

3. Except as herein otherwise expressly provided, no provision of this agreement shall in any respect be waived, altered, modified or amended unless such waiver, alteration, modification or amendments be committed to writing and signed by a member of your organization.

4. All monies, securities, commodities or other property which you may at any time be carrying for the undersigned or which may at any time be in your possession for any purpose, including safekeeping, shall be subject to a general lien for the discharge of all obligations of the undersigned to you, irrespective of whether or not you

have made advances in connection with such securities, commodities or other property, and irrespective of the number of accounts the undersigned may have with you.

5. All securities and commodities or any other property, now or hereafter held by you, or carried by you for the undersigned (either individually or jointly with others), or deposited to secure the same, may from time to time and without notice to me, be carried in your general loans and may be pledged, re-pledged, hypothecated or re-hypothecated, separately or in common with other securities and commodities or any other property, for the sum due to you thereon or for a greater sum and without retaining in your possession and control for delivery a like amount of similar securities or commodities.

6. Debt balance of the accounts of the undersigned shall be charged with interest, in accordance with your usual custom, and with any increases in rates caused by money market conditions, and with such other charges as you may make to cover your facilities and extra services.

7. You are hereby authorized in your discretion, should the undersigned die or should you for any reason whatsoever deem it necessary for your protection, to sell any or all of the securities or commodities or other property which may be in your possession, or which you may be carrying for the undersigned (either individually or jointly with others) or to buy in any securities, commodities or other property of which the account or accounts of the undersigned may be short, or cancel any outstanding orders in order to close out the account or accounts of the undersigned in whole or in part or in order to close out any commitment made in behalf of the undersigned.

Such sale, purchase or cancellation may be made at public auction or a private sale, without advertising the same and without notice to the undersigned or to the personal representatives of the undersigned, and without prior tender, demand or call of any kind upon the undersigned or upon the personal representatives of the undersigned, and you may purchase the whole or any part thereof free from any right of redemption, and the undersigned shall remain liable for any deficiency, it being understood that a prior tender, demand or call of any kind from you, or prior notice from you, of the time and place of such sale or purchase shall not be considered a waiver of your right to sell or buy any securities and/or commodities and/or other property held by you, or owed you by the undersigned at any time as hereinbefore provided.

8. The undersigned will at all times maintain margins for said accounts as required by you from time to time.

9. The undersigned undertakes, at any time upon your demand, to discharge obligations of the undersigned to you, or, in the event of a closing of any account of the undersigned in whole or in part, to pay you the deficiency, if any, and no oral agreement or instructions to the contrary shall be recognized or enforceable.

10. In case of the sale of any security, commodity, or other property by you at the direction of the undersigned and your inability to deliver the same to the purchaser by reason or failure of the undersigned to supply you therewith, then and in such event, the undersigned authorizes you to borrow any security, commodity, or other property necessary to make delivery thereof, and the undersigned hereby agrees to be responsible for any loss which

you may sustain thereby and any premiums which you may be required to pay thereon, and for any loss which you may sustain by reason of your inability to borrow the security, commodity, or other property sold.

11. At any time and from time to time, in your discretion, you may without notice to the undersigned, apply and/or transfer any or all monies, securities, commodities and/or other property of the undersigned between any accounts of the undersigned (other than from Regulated Commodity Accounts).

12. It is understood and agreed that the undersigned, when placing with you any sell order for short account, will designate it as such and hereby authorizes you to mark such order as being "short", and when placing with you any order for long account, will designate it as such and hereby authorizes you to mark such order as being "long." Any sell order which the undersigned shall designate as being for long account as above provided, is for securities then owned by the undersigned and, if such securities are then deliverable by you from any account of the undersigned, the signing of such order shall constitute a representation by the undersigned that it is impracticable for him then to deliver such securities to you but that he will deliver them as soon as it is possible for him to do so without undue inconvenience or expense.

13. In all transactions between you and the undersigned, the undersigned understands that you are acting as the broker of the undersigned, except when you disclose to the undersigned in writing at or before the completion of a particular transaction that you are acting, with respect to such transaction, as dealers for your own account or as brokers for some other person.

14. Reports of the execution of orders and statements of the accounts of the undersigned shall be conclusive if not objected to in writing, the former within two days, and the latter within ten days, after forwarding by you to the undersigned by mail or otherwise.

15. Communications may be sent to the undersigned at the address of the undersigned given below, or at such other address as the undersigned may hereafter give you in writing, and all communications so sent, whether by mail, telegraph, messenger or otherwise, shall be deemed given to the undersigned personally, whether actually received or not.

16. This agreement shall inure to the benefit of your successors and assigns, shall cover individually and collectively all accounts which the undersigned may open or reopen with you, shall be binding o my estate, heirs, executors, administrators and assigns, and if a corporation, partnership, or other business combination shall be binding on its successors and assigns, and shall be governed, and enforced under the laws of the State of New York. Subject to the last three sentences of this paragraph, any controversy arising out of or relating to the authorization, or the breach thereof, or to transactions with you by the undersigned, or any controversy relating to the account of the undersigned, shall be settled by arbitration in accordance with the rules, then in effect, of the Board of Directors of the American Stock Exchange, Inc., the Board of Directors of the New York Stock Exchange, Inc., or the National Association of Securities Dealers, Inc., as the undersigned may elect. If the undersigned does not make such election, by registered mail, addressed to the Legal department of Smith Barney, Har-

ris Upham & Co., Incorporated at your main office within five (5) days after demand by you that the undersigned make such election, then you may make such election. Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof. The parties, hereto, and all who claim under their rights shall be bound conclusively by such arbitration. The federal securities laws provide that agreements may not bind persons to waive compliance with any provision of the federal securities laws. Therefore, nothing in this paragraph shall in any way constitute a waiver or limitation of any rights which the undersigned may have under any federal securities laws. The provisions of this paragraph do not apply to commodity accounts, which are governed by the provisions of the Commodity Customer's Agreement.

17. The undersigned, if an individual, represents that the undersigned is of full age, that the undersigned is not an employee of any exchange, or of any corporation of which any exchange owns a majority of the capital stock, or of a member of any exchange, or of a member firm or member corporation registered on any exchange, or of a bank, trust company, insurance company or of any corporation, firm or individual engaged in the business of dealing, either as a broker or as principal, in securities, bill of exchange, acceptances or other forms of commercial paper. The undersigned further represents that no one except the undersigned has an interest in the account or accounts of the undersigned with you.

18. In the event that you have to employ counsel to collect any debit which the undersigned owes to you, you are hereby authorized to charge the undersigned for

the reasonable costs of collection including but not limited to attorneys' fees, court costs and expenses whatsoever in nature in effecting said collection.

Witness .....Edward & Ruth Adrian
Clients Name (Please Print)

Dated .....Signature x/s/Edward Adrian

.....Signature x /s/ Ruth C. Adrian
(City) (State) (If Joint A/C Both Must Sign)

CUSTOMER'S LOAN CONSENT

Until you receive written notice of revocation from the undersigned, you are hereby authorized to lend, to yourselves as brokers or to other any securities held by you on margin for the account of, or under the control of, the undersigned.

Dated .....Signature x /s/ Edward Adrian

.....Signature x /s/ Ruth C. Adrian
(City) (State) (If Joint A/C Both Must Sign)

Witness .....

87 334

Supreme Court, U.S.
FILED
SEP 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. [redacted]

IN THE
Supreme Court of the United States
OCTOBER TERM 1987

SMITH BARNEY, HARRIS UPHAM & CO., INC.
and ALBERT ROBERTS III,
Petitioners/Cross-Respondents,

vs.

EDWARD J. ADRIAN and RUTH C. ADRIAN,
Respondents/Cross-Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONERS/CROSS-RESPONDENTS IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI OF EDWARD J. ADRIAN AND RUTH C. ADRIAN

BENNETT FALK, ESQ.
KEITH OLIN, ESQ.
Ruden, Barnett, McClosky, Smith,
Schuster & Russell, P.A.
One Biscayne Tower, Suite 2020
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Miami, Florida 33131
(305) 371-6262
Attorneys for Petitioners/
Cross-Respondents

PARTIES TO THE PROCEEDINGS

1. EDWARD J. ADRIAN, Cross-petitioner/Plaintiff.
2. RUTH C. ADRIAN, Cross-petitioner/Plaintiff.
3. SMITH BARNEY, HARRIS UPHAM & CO., INC., Cross-respondent/Defendant ("SMITH BARNEY").[1]
4. ALBERT ROBERTS, III, Cross-respondent/Defendant ("ROBERTS").
5. MORTON L. ANNIS, JR., Cross-respondent/Defendant.

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[1]Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, SMITH BARNEY lists all parent companies, subsidiaries (except wholly-owned subsidiaries); and affiliates as follows:

Primerica Corporation; Smith Barney, Inc.; IPO Holdings, Inc.; Institutional Property Owners, Inc. III; Institutional Property Owners, Inc. IV; Institutional Property Owners, Inc. V; 1345 Media Corp.; 1345 Realty Corporation; Americas Avenue Corporation; First Century Partners, Inc.; GYM Corporation; MLA 50 Corporation; MLA GP Corporation; Mutual Management Corporation; SB Depositary Corporation; SBD Lease Funding Corporation; Smith Barney Asset Management Co., Ltd.; Smith Barney BJV Corp.; Smith Barney Capital Corp.; Smith Barney Futures Partners, Inc.; Smith Barney Mortgage Capital Corp.; Smith Barney Mortgage Capital Group, Inc.; Smith, Barney Realty Services, Inc.; Twenty Broad Street Leasing Company, Incorporated; SB Asset Capital Corp.; Mutual Management Corporation; Associated Madison Companies, Inc.; AC Insurance Company; AC RE, Ltd.; Brookstone Insurance Company; Massachusetts Indemnity & Life Insurance Company; Executive Fund Life Insurance Company; National Benefit Life Insurance Company; Pennsylvania Life Insurance Company; Penn Casualty Insurance Company; Trans Pacific Life Insurance Company;

Footnote 1 (continued)

Transport Life Insurance Company; American Financial Life Insurance Company; Continental Life Insurance Company; Coronet Investment Company; Triad Life Insurance Corporation; Voyager Life Insurance Company; Voyager Atlantic Reinsurance Ltd.; First Protection Life Insurance Company; Voyager Life and Health Insurance Company; Voyager Insurance Services, Inc.; Voyager Protection Insurance Company; Voyager Guaranty Insurance Company; Voyager Life Insurance Company of South Carolina; American Capital Management & Research, Inc.; ACFS, Inc.; American Capital Advisors, Inc.; American Capital Asset Management, Inc.; American Capital Exchange Corporation; American Capital Financial Services, Inc.; American Capital Marketing, Inc.; American Capital Services, Inc.; American Capital Shareholders Corporation; AC Capital Management, Inc.; American Capital Corporation; AMAD Technologies Corp.; AMC Aircraft Corp.; Associated Direct Marketing Services, Inc.; BNC Operating Corp.; Canwood Corporation; Erisa Corporation; First Madison Capital Corp.; National Marketing Corporation; RCM Acquisition, Inc.; SCN Acquisitions Company; Satellite Conference Network, Inc.; Verochris Corporation; PennCorp Financial, Inc.; California Sales Agency, Inc.; Dixie Associates, Inc.; Midwest Region, Inc.; Midwest Region, Inc. of Colorado; Mississippi Region Associates, Inc.; North Atlantic Insurance Agency, Inc.; North Carolina United Associates, Inc.; Penn Marketing Corporation; Executive Fund Corporation; Penn Insurance Marketing Agency, Inc.; Penn Insurance Marketing Corporation; Penn Insurance Marketing Corporation of Arizona; Penn Marketing Corporation of Arkansas; Penn Marketing Corporation of Colorado; Penn Marketing Corporation of Maine; Penn Marketing Corporation of Maryland; Penn Marketing Corporation of Montana; Penn Marketing Corporation of New Mexico; Penn Marketing Corporation of Oregon; Penn Marketing Corporation of South Dakota; Penn Marketing Corporation of Utah; Penn Marketing Corporation of Wyoming; PennCorp Financial Services, Inc.; Mid-Atlantic Capital Insurance Company, Ltd.; PennCorp Group Management, Inc.; Pennsylvania

Footnote 1 (continued)

Equities Corporation; Pennsylvania Securities Company; P.G.A. Reinsurance, Inc.; PennCorp Financial, Inc.; Penn Re, Inc.; Safe Drivers Plan, Inc.; Southeastern Region Associates, Inc.; United Silver Spring Associates, Inc.; Voyager Group, Inc.; Voyager Indemnity Insurance Company; Voyager Property & Casualty Insurance Company; Voyager Reinsurance Company; Federated General Life Insurance Company; Voyager Securities, Inc.; Voyager Service Agreements, Inc.; Voyager Warranty Corporation; Voyager Service Warranties, Inc.; Key-Matic Southeast, Inc.; Gill & Associates, Inc.; Berg Enterprises, Inc.; B.E.I. Advisors, Inc.; The Berg Agency, Inc. (New Jersey); The Berg Agency, Inc. (New York); The Berg Agency-Pennsylvania, Inc.; Berg Associates; Berg Enterprise Realty, Inc.; Berg Enterprises Land Technology, Inc.; Berg Enterprises Realty, Inc.; Berg Relocation Company, Inc.; Berg Ventures, Inc.; The Blau and Berg Company; Brody-Blau-Berg Appraisal Company; Dublin Escrow, Inc.; Farrington Realty, Inc.; Margaretten & Company, Inc.; AC Finance Company; Margaretten Realty Company, Inc.; Margaretten Financial Services, Inc.; Margaretten & Company, Inc. of Wisconsin; North American Mortgage Corporation; North American Mortgage Corporation of Wisconsin; Metro Ventures, Inc.; M.K.L. Realty Corporation; The Real Estate Place, Inc.; Woodson Ventures, Inc.; American Specialty Retailing Group, Inc.; Dunham's Athleisure Corporation; The Musicland Group, Inc.; Barmour Music Corporation; Everest Plastics, Ltd.; Mourbar Music Corporation; Southtown Music, Inc.; Talmont Music Corporation; Weiss & Barry Copyrights; Fingerhut Companies, Inc.; FDC, Inc.; Figi's Inc.; Family Farm Gifts, Inc.; Figi's Gifts, Inc.; Fingerhut Corporation; Baker Rhodes Marketing Corporation; Baker Rhodes Warehouse Sale Corporation; Colour Graphics Corporation; Distribution & Transport, Inc.; Fingerhut Europe, Inc.; Aspect Mail Order Limited; Direct Trading and Marketing Limited; Fingerhut (UK) Limited (England); Worldlike Limited; Fingerhut Financial Services Corporation; Fingerhut Marketing Services, Inc.; Fingerhut Real Estate Corporation; Imperial Plastics, Inc.; Wiman Apparel, Inc.; Wiman

Footnote 1 (continued)

Corporation; Michigan Bulb Company; Littleton Advertising, Inc.; Rockwood Gardens; Progressive Nurseries, Inc.; Vita Leaf Laboratories, Inc.; Flower of the Month, Inc.; Looart Press, Inc.; Current, Inc.; MBLoo, Inc.; OWL Stores, Inc. (Colorado); OWL Stores, Inc. (California); Amco Biotech, Inc.; Ampole, Inc.; BCL, Inc.; Mirasure, Inc.; Mirasure Insurance Company, Ltd.; Pacific Basin Investments Ltd.; Primerica Corporation; Sumter & Choctaw Railway Company; Tech-Air Corporation; Tinmet Corporation; Naterm Corporation; Sibarco Holdings, Inc.; SBHU Life Agency of Ohio, Inc.; SBHU Life Agency of Oklahoma; SBHU Life Agency of Texas, Inc.

TABLE OF CONTENTS

	PAGE
PARTIES TO THE PROCEEDINGS	i
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vi
SUMMARY OF ARGUMENT	2
REASONS FOR DENYING THE CROSS-PETITION FOR WRIT OF CERTIORARI	3
CONCLUSION	8

TABLE OF AUTHORITIES

CASES:	PAGE
Colangelo v. *Dean Witter Reynolds, Inc.* [1985-86] FED. SEC. L. REP. (CCH) Paragraph 92,365 (M.D. Fla. 1985)	6
Dixon v. *United States*, 381 U.S. 68, 74, 85 S.Ct. 1301, 1305, 14 L.Ed.2d 223 (1965)	6
Ernst & Ernst v. *Hochfelder*, 425 U.S. 185, 214, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976)	6
National Association of Greeting Card Publishers v. *United States Postal Service*, 462 U.S. 810, 819-20, 103 S.Ct. 2717, 2724-25, 77 L.Ed.2d 195 (1983)	4
Pate v. *Robinson*, 383 U.S. 375, 377, 86 S.Ct. 836, 838, 15 L.Ed.2d 815 (1966)	4
Perry Education Assn. v. *Perry Local Educators' Assn.*, 460 U.S. 37, 43-44, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983)	4
Phillips v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393, 1398 n. 17 (8th Cir. 1986)	6
Shearson/American Express, Inc. v. *McMahon*, 478 U.S. ___, 107 S.Ct. 2332, 55 U.S.L.W. 4757 (June 8, 1987)	2, 4, 5, 6, 7, 8
STATUTES:	
Federal Securities and Exchange Act of 1934 15 U.S.C. §78j(b)-[§10(b)]	5, 6, 8
REGULATIONS:	
Federal Securities and Exchange Commission 17 C.F.R. §240.15c2-2	2, 3, 4, 5, 6, 7, 8
RULES:	
Rules of the Supreme Court of the United States Rule 17	2, 3, 5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

No. 87-146

SMITH BARNEY, HARRIS UPHAM & CO., INC. AND ALBERT ROBERTS III,

Petitioners/Cross-Respondents,

vs.

EDWARD J. ADRIAN AND RUTH C. ADRIAN,

Respondents/Cross-Petitioners.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONERS/CROSS-RESPONDENTS IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI OF EDWARD J. ADRIAN AND RUTH C. ADRIAN

SUMMARY OF ARGUMENT

The Cross-Petition for Writ of Certiorari fails to raise issues that meet the criteria for review on writ of certiorari under Rule 17 of the Supreme Court of the United States.

Cross-Petitioners have failed to demonstrate the existence of conflicting decisions of any lower federal courts with respect to 17 C.F.R. §240.15c2-2, the establishment of erroneous precedent by the lower courts in this case with respect to that Rule, or that this case involves unusually important or difficult questions of federal law warranting review on writ of certiorari.

Cross-Petitioners' assertions with respect to the effect of 17 C.F.R. §240.15c2-2 also fail to present an important question of federal law. This Court's decision in *Shearson/American Express, Inc.* v. *McMahon,* 478 U.S. ____, 107 S.Ct. 2332, 55 U.S.L.W. 4757 (June 8, 1987), which held that claims arising under Section 10(b) of the Securities Exchange Act of 1934 are subject to arbitration under the Federal Arbitration Act, effectively vitiated the Securities and Exchange Commission's Rule 15c2-2, which was based upon the Commission's erroneous belief that Section 10(b) claims were in fact not arbitrable.

REASONS FOR DENYING CROSS-PETITION FOR WRIT OF CERTIORARI

The Cross-Petition Fails To Present Issues Suitable For Review on Certiorari

Rule 17 of the Supreme Court of the United States provides:

> **Considerations governing review on certiorari**
>
> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> . . .
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The ADRIANS have failed to meet any of the criteria for review specified in Rule 17, and their Cross-Petition should therefore be denied.

Failure to Meet Rule 17 Criteria

The ADRIANS' Cross-Petition fails to make any showing that the issues raised with respect to 17 C.F.R. §240.15c2-2 ("Rule 15c2-2") are of such importance to the federal judicial system as to warrant certiorari review by the Supreme Court. The ADRIANS cite no conflicting circuit court of appeals or even district court decisions with respect to the effect of Rule 15c2-2 upon the arbitration of claims arising under the Securities Exchange Act of 1934. *Cf. Shearson/American Express, Inc.* v. *McMahon*, 478 U.S. ____, 107 S.Ct. 2332, 55 U.S.L.W. 4757 (June 8, 1987) (certiorari granted to resolve conflicts among lower courts on the issues of whether Section 10(b) and federal RICO Act claims were subject to arbitration under the Federal Arbitration Act); *National Association of Greeting Card Publishers* v. *United States Postal Service*, 462 U.S. 810, 819-20, 103 S.Ct. 2717, 2724-25, 77 L.Ed.2d 195 (1983) ("Because of the inconsistencies in the holdings of the Second and District of Columbia Circuits, we granted certiorari."). Nor have the ADRIANS demonstrated that the decisions of the lower courts in the instant case have created precedent for use in other cases concerning the applicability of Rule 15c2-2. Furthermore, given the clear impact of the *McMahon* decision upon Rule 15c2-2, *see infra*, it cannot be said that the ADRIANS have raised any particularly difficult or novel question of federal or constitutional law. *See, e.g., Pate* v. *Robinson*, 383 U.S. 375, 377, 86 S.Ct. 836, 838, 15 L.Ed.2d 815 (1966) (certiorari granted to resolve "difficult questions" of federal-state relations); *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37, 43-44, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983) (certiorari granted to resolve important constitutional issues and lower court conflicts).

Cross-Petitioners' Arguments

In their Cross-Petition, however, the ADRIANS make the following claim:

> This Court should exercise its discretionary certiorari jurisdiction in this case for several reasons within the purview of Rule 17, Rules of the Supreme Court of the United States. First, an important question of Federal law, the effect of 17 C.F.R. §240.15c2-2, although timely raised, has been overlooked or ignored by the courts below. Second, the decision of the circuit court on this case conflicts with this Court's decision in *McMahon, supra.*

Cross-Petition for Writ of Certiorari at 2. Neither of the two reasons advanced by the ADRIANS as alternative bases to invoke review on writ of certiorari can withstand scrutiny.

First, the ADRIANS' assertion concerning the purported effect of Rule 15c2-2 upon the parties' agreement to arbitrate fails to present an important question of federal law. In *Shearson/American Express, Inc.* v. *McMahon*, 478 U.S. ____, 107 S.Ct. 2332, 55 U.S.L.W. 4757 (June 8, 1987), this Court held that claims arising under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), are subject to arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§1-14. As the *McMahon* decision noted, "Rule 15c2-2 was premised on the [Securities and Exchange] Commission's assumption, based upon court of appeals decisions following *Wilko* [v. *Swan*, 346 U.S. 427 (1953)], that agreements to arbitrate Rule 10b-5 claims were not, in fact, arbitrable." 107 S.Ct. at 2341 n. 3 (quoting Brief for the Securities and Exchange Commission as *Amicus Curiae* at 18 n. 13, *Shearson/American Express, Inc.* v. *McMahon*, 107 S.Ct. 2332 (1987) (No. 86-44)). Rule 15c2-2 thus constituted the

Securities and Exchange Commission's attempt to articulate in rule form what it considered to be a settled principle of law at the date of its promulgation. *Phillips* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393, 1398 n. 17 (8th Cir. 1986); *Colangelo* v. *Dean Witter Reynolds, Inc.*, [1985-86] FED. SEC.L.REP. (CCH) Paragraph 92,365 at 92,330 (M.D. Fla. 1985). As the *McMahon* decision clearly settled, however, the Securities and Exchange Commission was mistaken in its assessment of the arbitrability of Section 10(b) claims. *McMahon*, 107 S.Ct. at 2343.

The scope of the Securities and Exchange Commission's authority is, of course, circumscribed by the language of the controlling statutes. The Commission is empowered only "to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 214, 96 S.Ct. 1375, 1391, 47 L.Ed.2d 668 (1976) (quoting *Dixon* v. *United States*, 381 U.S. 68, 74, 85 S.Ct. 1301, 1305, 14 L.Ed.2d 223 (1965)). In the wake of *McMahon*, it is clear that Rule 15c2-2 fails to comport with the will of Congress as expressed in the Securities Exchange Act of 1934 and the Federal Arbitration Act. Having been effectively vitiated by *McMahon* (and apparently recognized to be erroneous by the Securities and Exchange Commission, *see McMahon*, 107 S.Ct. at 2341 n. 3), Rule 15c2-2 lacks continued vitality and no longer presents an important question of federal law for purposes of certiorari review under Rule 17 of the United States Supreme Court.

The second reason given by the ADRIANS for seeking a writ of certiorari, their claim that a conflict exists between the decision of the circuit court in this case and *McMahon*, is also inaccurate. The conflict alluded to by Cross-Petitioners is the direct and irreconcilable conflict between the decision of the court of appeals in this case and this Court's

recent decision in *McMahon* with respect to the arbitrability of claims arising under Section 10(b) of the Securities Exchange Act of 1934 and the federal RICO Act. Such conflict only constitutes a basis for granting SMITH BARNEY and ROBERTS' Petition for Writ of Certiorari (which the ADRIANS do not oppose[2]), however, and not the ADRIANS' Cross-Petition for Writ of Certiorari.

No conflict exists between any holding in *McMahon* with respect to 17 C.F.R. §240.15c2-2 and any lower court holding or finding in this case with respect to that rule. Neither the district court nor the court of appeals even addressed the ADRIANS' arguments with respect to 17 C.F.R. §240.15c2-2. To the contrary, the decisions of the courts below were entirely consistent with *McMahon* in that neither held or found that Rule 15c2-2 was a bar to arbitration. Even if one were to assume *arguendo* that Rule 15c2-2 rendered arbitration agreements unenforceable, assumed that the Commission's interpretation had the force of law, and further assumed that the lower court's rulings in this case conflicted with Rule 15c2-2, this Court has already resolved the alleged conflict by its ruling in *McMahon*, which effectively vitiated Rule 15c2-2. Thus, there is no conflict for purposes of the Cross-Petition for Certiorari.

This Court should deny the ADRIANS' Cross-Petition for Writ of Certiorari.

[2] *See* ADRIANS' Brief of Respondents In Response To Petition Of Smith Barney, Harris Upham & Co., Inc. And Albert Roberts, III, For Writ of Certiorari at 2 ("However . . . this Court should grant the writ [sought by SMITH BARNEY and ROBERTS] . . . .").

CONCLUSION

For the foregoing reasons, Petitioners/Cross-Respondents, SMITH BARNEY and ROBERTS, respectfully request that this Court deny the ADRIANS' Cross-Petition for Writ of Certiorari.

Petitioners/Cross-Respondents further respectfully request, however, that this Court grant their Petition for Writ of Certiorari to review the decision of the Eleventh Circuit Court below to the extent it holds, contrary to the subsequent *McMahon* decision, that claims under §10(b) of the 1934 Act and the RICO Act are exempt from the provisions of the Federal Arbitration Act.

Respectfully submitted,

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